IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding, Special Title [Rule 1550(b)] **In re MARRIAGE CASES.**	Case No. S147999 (JCCP No. 4365)

First Appellate District, Case Nos. A110449, A110450, A110451
A110463, A110651, A110652
San Francisco County Superior Court Nos. CGC-04-429539, CGC-04-504038,
CGC-04-429548, CPF-04-503943, CGC-04-428794
Los Angeles County Superior Court Case No. BS-088506
Hon. Richard A. Kramer, Judge

SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER DATED JUNE 20, 2007

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The State of California and Attorney General Edmund G. Brown Jr. (the "State") submit this supplemental brief addressing the questions contained in this Court's order dated June 20, 2007.

QUESTION NUMBER ONE

What differences in legal rights or benefits and legal obligations or duties exist under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses? Please list all of the current differences of which you are aware.

RESPONSE TO QUESTION NUMBER ONE

There Are No Differences Between the Legal Rights and Benefits or the Legal Obligations and Duties Provided to Married Couples and Those Provided to Registered Domestic Partners Under California Law.

The State is not aware of any differences between the legal rights and benefits and the legal obligations and duties affecting registered domestic partners under California law and the rights, benefits, duties and obligations given to married couples. As explained in the answer briefs, the State's laws governing domestic partnerships have evolved since 1999 such that there do

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not appear to be any legal rights, benefits, duties or obligations conferred by state law upon married couples that are not also possessed by registered domestic partners. (Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits ("State Answer Brief") at pp. 1, 7-12; Answer Brief of Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits ("Gov. Answer Brief") at pp. 9-11.)

This answer is limited to the rights, benefits, obligations and duties granted to registered domestic partners under California law. The State acknowledges that California law cannot modify federal law, which does not recognize domestic partnerships and defines marriage solely as the union of a man and a woman. Thus, domestic partners are denied many federal benefits provided to persons in traditional marriages. (State Answer Br. at pp. 11-12.) Even if same-sex couples were allowed to married under California law, they would still be denied the benefits that federal law gives to married couples.

Nor can the State compel other states to recognize California law. Thus, some parties may contend that the rights possessed by domestic partners in California will not protect them if they travel to states that do not recognize their partnerships. Legalizing same-sex marriage in California, however, would not address this issue because other states would not be required to recognize same-sex marriages from California. (State Answer Br. at p. 12, citing 28 U.S.C. § 1738C.)

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QUESTION NUMBER TWO

What, if any, are the minimum, constitutionally-guaranteed substantive attributes or rights that are embodied within the fundamental constitutional "right to marry" that is referred to in cases such as *Perez v. Sharp* (1948) 32 Cal.2d 711, 713-714? In other words, what set of substantive rights and/or obligations, if any, does a married couple possess that, because of their constitutionally protected status under the state Constitution, may not (in the absence of a compelling interest) be eliminated or abrogated by the Legislature, or by the people through the initiative process, without amending the California Constitution?

RESPONSE TO QUESTION NUMBER TWO

Although a Compelling Justification Would Be Needed Before the State Could Forbid a Man and a Woman from Entering into the Essential Relationship We Know as Marriage, Married Couples Do Not Possess Any Substantive Right or Obligation Under California Law That Could Not Be Eliminated by Legislative Action Supported by a Rational Basis.

The California Constitution does not contain a specifically enumerated right to marry, but cases from this Court and the United States Supreme Court address a fundamental right to marry that has been implied. These cases implicitly recognize that a man and a woman have a "fundamental" right (*Zablocki v. Redhail* (1978) 424 U.S. 374, 383 [noting that prior decisions "make clear that the right to marry is of fundamental importance"]; *Meyer v. State of Nebraska* (1923) 262 U.S. 390, 399 [describing the right to "marry, establish a home, and bring up children" as a right protected by due process]), to enter into a publicly declared, personal relationship of mutual and lifelong commitment that is commonly known as "marriage," including, but not exclusively, the possibility of rearing children (see, e.g., *Turner v. Safley* (1987) 482 U.S. 78, 95-96 [inmate retained right to marry despite incarceration]), and that, if the state chooses to reserve to

itself the prerogative of approving this reciprocal commitment as a condition of its validation, then, for example, the state may not withhold that approval on account of race. (*Perez v. Sharp* (1948) 32 Cal.2d 711; *Loving v. Virginia* (1967) 388 U.S. 1.) As a general proposition, rights deemed "fundamental" under the United States Constitution may not be restricted without a compelling governmental justification, but there is authority for the proposition that states may impose "reasonable regulations that do not significantly interfere with decisions to enter the marital relationship."[1/] (See *Zablocki v. Redhail, supra,* 424 U.S. at p. 386; see also, *id.* at p. 396-397 (conc. opn. of Powell, J.).)

But the State is unaware of any opinion of this Court or of the United States Supreme Court that defines the essential minimum contours of the fundamental right to marry. As noted in the State's prior brief, to the extent that civil marriage might, in earlier times, have been required to enjoy conjugal and family relationships then regarded as the exclusive prerogative of married couples – such as cohabitation and lawful sexual intimacy, mutual lifelong care and support, legitimate procreation, or rearing of children – such state authorization is no longer needed. (See State Answer Br. at pp. 7-10.) Nevertheless, the State would expect that the United States Supreme Court would conclude that a state may not, without a compelling

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1. For example, laws creating significant disincentives for marriage have been subject merely to rational basis review (*Califano v. Jobst* (1977) 434 U.S. 47, 54 [applying rational basis review to uphold a law that eliminated social security benefits for a dependent child who married a person who was ineligible for such benefits even though the rule might deter people from marrying their chosen marital partners]), as have restrictions on divorce – the choice to no longer be married. (*Sosna v. State of Iowa* (1975) 419 U.S. 393, 406-409 [upholding one-year residency requirement as a reasonable regulation of divorce]; *Dribin v. Superior Court* (1951) 37 Cal.2d 345, 352 [three-year waiting period before granting a divorce based on insanity of spouse upheld as not wholly arbitrary].)

justification, forbid a man and a woman from enjoying the intangible emotional benefits that come from the ancient tradition of public declaration and recognition of life partnership. (See, e.g., *Turner v. Safley, supra,* 482 U.S. at p. 95 [noting that "inmate marriages, like others, are expressions of emotional support and public commitment"].)[2/]

But the State submits that, except for this essential ability to choose and declare one's life partner in a reciprocal and binding contractual commitment of mutual support, any of the statutory rights and obligations that are afforded exclusively to married couples in California could be abrogated or eliminated by the Legislature or the electorate for any rational legislative purpose.

QUESTION NUMBER THREE

Do the terms "marriage" or "marry" themselves have constitutional significance under the California Constitution? Could the Legislature, consistent with the California Constitution, change the name of the legal relationship of "marriage" to some other name, assuming the legislation preserved all of the rights and obligations that are now associated with marriage?

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2. And, as previously stated by the State in these proceedings, the Legislature has recognized the importance of those intangible benefits by extending the opportunity to obtain them to same-sex couples under the rubric of the domestic partnership. (State Answer Br. at p. 62.)

RESPONSE TO QUESTION NUMBER THREE

No Constitutional Provision Would Prohibit the State from Changing the Name of the Marriage Relationship to Some Other Name.

In response to the Court's third set of questions, the State submits that the words "marry" and "marriage" have no essential constitutional significance under the California Constitution. (See State Answer Br. at p. 63.) Thus, the Legislature could change the name of the legal relationship now known as "marriage" to some other name without any constitutional impediment.

QUESTION NUMBER FOUR

Should Family Code section 308.5 – which provides that "[o]nly marriage between a man and a woman is valid or recognized in – California" – be interpreted to prohibit only the recognition in California of same-sex marriages that are entered into in another state or country or does the provision also apply to and prohibit same-sex marriages entered into within California? Under the Full Faith and Credit Clause and the Privileges and Immunities Clause of the federal Constitution (U.S. Const., art. IV, §§§§ 1, 2, cl.1), could California recognize same-sex marriages that are entered into within California but deny such recognition to same-sex marriages that are entered into in another state? Do these federal constitutional provisions affect how Family Code section 308.5 should be interpreted?

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RESPONSE TO QUESTION NUMBER FOUR

Neither the Full Faith and Credit Clause Nor the Privileges and Immunities Clause Is a Factor in the Construction of Family Code Section 308.5.

All parties to this litigation acknowledge that Family Code section 308.5 *at least* bars recognition of same-sex marriages entered into outside California.[3/] Neither the full faith and credit clause nor the privileges and immunities clause affects enforcement of section 308.5 to this extent, so long as California policy can be said to disfavor same-sex marriage.

The full, faith and credit clause "require[s] each state to give effect to the official acts of other States," such as judgments. (*Nevada v. Hall* (1979) 440 U.S. 410, 421 [holding that Nevada could not claim immunity from lawsuit in action brought in California court by California residents to recover for injuries suffered in accident on California highway and that full faith and credit clause did not require California courts to apply the Nevada statute limiting recovery to $25,000].) The clause, however, "does not require a State to apply another State's law in violation of its own legitimate public policy." (*Id* at p. 422.) Similarly, the purpose of the privileges and immunities clause is to place the citizens of different states on equal footing with each other with regard to the advantages resulting from citizenship. (*Lunding v. New York Tax Appeals Tribunal* (1998) 522 U.S. 287, 296.)

California's policy of non-recognition does not discriminate in violation of full, faith and credit or the privileges and immunities clause, and California's policy of not licensing same-sex marriages in this state is not dependent upon section 308.5; that policy was already rooted in Family

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3. The petitioners challenging the marriage laws argue that section 308.5 does not apply to marriages entered into in California, but they concede that the statute bars recognition of same-sex marriages entered into pursuant to the laws of others states or nations.

Code sections 300 and 301 before enactment of section 308.5. Accordingly, neither the full faith and credit clause nor the privileges and immunities clause is a factor in determining whether section 308.5 should be construed affirmatively to bar licensing of same-sex marriages in California.

That said, should this Court hold that the California Constitution compels licensing of same-sex marriages, then the *enforceability* of section 308.5's bar to recognition of out-of-state same-sex marriages would likely be called into question in this Court at some later date. By the same token, should this Court hold that California's Constitution is not offended by a legislative policy of licensing only traditional marriage, then the federal constitutionality of the statute's non-discriminatory bar to recognition of out-of-state marriages could not reasonably be doubted.

Thus, as the court of appeal correctly concluded, it is not necessary for the Court to decide in these proceedings whether section 308.5, independently of section 300 and 301, *forbids* licensing of same-sex marriage. (Slip Opn. at p. 15.) If, as the State maintains, California's Constitution is satisfied by the legislative choice to provide same-sex couples all the rights and benefits that are afforded married couples, then it is unnecessary to construe the scope of section 308.5's bar to recognition of same-sex marriages. On the other hand, if the Court were to hold that California's Constitution compels licensing of same-sex marriages in this

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state, then section 308.5 would be unconstitutional to the extent that the statute *purports* to forbid the licensing of same-sex marriage.[4/]

Dated: August 17, 2007

Respectfully submitted,

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4. There would remain the question whether section 308.5 could constitutionally be enforced to bar recognition of *out-of-state* same-sex marriages, but consideration of that question can be left for another day.

CERTIFICATE OF COMPLIANCE
[Pursuant to California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I hereby certify that the attached **SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER DATED JUNE 20, 2007** is proportionately spaced utilizing 13-point Times New Roman font. In reliance on the word count feature of the WordPerfect 8 software used to prepare this brief, I further certify that the total number of words of this brief is 2,083, exclusive of those materials not required to be counted. Counsel for State of California and the Attorney General has submitted with this brief an application to file a brief in excess of the word limit.

Dated: August 17, 2007

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